

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONCISE SUMMARY OF THE CASE

Pursuant to 3rd Cir. LAR 33.3, counsel are required to file a concise summary of the case within **14** days of the date of docketing of the Notice of Appeal. Total statement is limited to no more than 2 pages, single-spaced. Counsel may utilize this form or attach a 2 page statement encompassing the information required by this form.

SHORT
CAPTION: **FedEx Freight, Inc. v. NLRB**

USCA NO.: 15-2712

LOWER COURT or AGENCY and DOCKET NUMBER:
National Labor Relations Board, 22-CA-146653

NAME OF
JUDGE: _____

Specify who is suing whom, for what, and the subject of this action. Identify (1) the nature of the action; (2) the parties to this appeal; (3) the amount in controversy or other relief involved; and (4) the judgment or other action in the lower court or agency from which this action is taken:

This case is before the Court on the National Labor Relations Board's (the "Board") Application to Enforce (15-2585) and FedEx Freight's Cross-Petition to Review a Decision and Order issued by the Board on May 19, 2015, 362 NLRB No. 91, in which the Board directed FedEx Freight to bargain with the International Brotherhood of Teamsters Local 701 (the "Union") as the bargaining representative of a unit composed solely of Drivers and Road Drivers employed by FedEx Freight at its South Brunswick, NJ facility. FedEx Freight asserts that the proper unit also includes dockworkers employed at the South Brunswick facility. The Board seeks enforcement of its Order, and FedEx Freight asks the Court to overturn the Board's Order.

LIST and ATTACH a copy of each order, judgment, decision or opinion which is involved in this appeal. If the order(s) or opinion(s) being appealed adopt, affirm, or otherwise refer to the report and recommendation of a magistrate judge or the decision of a bankruptcy judge, the report and recommendation or decision shall also be attached.

362 NLRB No. 91 is attached.

Provide a short statement of the factual and procedural background, which you consider important to this appeal:

In the underlying Board proceeding, the Union filed a petition seeking to represent a unit consisting only of Drivers and Road Drivers at the South Brunswick service center. FedEx Freight urged that the proper unit also include Dockworkers employed at the South Brunswick service center. The Regional Director found that the Union's requested unit consisting of Drivers and Road Drivers was an appropriate unit and directed an election. FedEx filed a Request for Review of the Regional Director's unit determination. The Board denied the request, and an election was held. The Union won the election, and the election was certified by the Board. To test the appropriateness of the certified bargaining unit, FedEx Freight refused to bargain with the Union. As a result, the Regional Director filed a complaint alleging that the refusal to bargain constituted a violation of § 8(a)(1) and (5) of the National Labor Relations Act. The General Counsel filed a Motion for Summary Judgment, which the Board granted. The Board found the driver-only unit was an appropriate unit and that FedEx Freight therefore violated §§ 8(a)(1) and (5) of the Act and ordered FedEx Freight to bargain with the Union. FedEx Freight now petitions for review of the Board's Order.

Identify the issues to be raised on appeal:

1. Whether the Board's reliance on Specialty Healthcare violated the long standing traditional community-of-interest test?
2. Whether the Board's use of the overwhelming-community-of-interest test was a departure from well established Board precedent without reasoned explanation in violation of the Administrative Procedures Act.
3. Whether the Board's use of the overwhelming-community-of-interest test improperly gave controlling weight to the union's proposed unit in violation of § 9(c)(5) of the National Labor Relations Act?

This is to certify that this Concise Summary of the Case was electronically filed with the Clerk of the U.S. Court of Appeals for the Third Circuit and a copy hereof served to each party or their counsel of record

this 17 day of August, 2015.

/s/ Brett M. Anders

Signature of Counsel

Rev. 07/2015

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

FedEx Freight, Inc. and International Brotherhood of Teamsters, Local 701. Case 22–CA–146653

May 19, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by International Brotherhood of Teamsters, Local 701 (the Union) on February 19, 2015, the General Counsel issued the complaint on March 4, 2015, alleging that FedEx Freight, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request for recognition and to bargain following the Union's certification in Case 22–RC–134873. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations of the complaint, and asserting certain affirmative defenses.

On March 25, 2015, the General Counsel filed a Motion for Summary Judgment. On March 27, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, in which it requested that the Board clarify the record to include additional evidence. The General Counsel filed an opposition to the Respondent's request to clarify the record.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain but contests the validity of the Union's certification on the basis of its arguments, raised and rejected in the representation proceeding, that the certified bargaining unit is inappropriate because it excludes the Respondent's dockworkers.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine

the decision made in the representation proceeding.¹ We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Arkansas corporation, has been engaged in interstate transportation of less than truckload commodity freight, with an end-of-the-line terminal located at 9 Distribution Way, Monmouth Junction, New Jersey.

During the 12-month period preceding issuance of the complaint, the Respondent derived gross revenues in excess of \$50,000 directly from enterprises located outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and

¹ The Respondent requests that the Board "clarify" the record in the representation proceeding by admitting into evidence a report purportedly detailing the hours worked by city drivers, road drivers, and dockworkers at other "non-domiciled" locations for the time period of February 1 to July 31, 2014. The Respondent made the same request in *FedEx Freight, Inc.*, 362 NLRB No. 74 (2015). Here, as there, we shall treat the request as a motion to reopen the representation proceeding record. Further, here, as there, the request is denied. The proffered information does not constitute newly discovered and previously unavailable evidence, nor would the evidence, if adduced, establish special circumstances.

A party seeking to introduce new evidence after the record of a representation proceeding has closed must establish that (1) the evidence existed but was unavailable to the party before the close of the hearing; (2) the evidence would have changed the result of the proceeding; and (3) it moved promptly upon discovery of the evidence. *Manhattan Center Studios*, 357 NLRB No. 139, slip op. at 3 (2011); Rules and Regulations, Sec. 102.65(e). To qualify as newly discovered evidence, such evidence must have been in existence at the time of the representation hearing and could not have been discovered by reasonable diligence. *Crew One Productions*, 362 NLRB No. 8, slip op. at 1 fn. 1 (2015); *Manhattan Center Studios*, 357 NLRB No. 139, slip op. at 3. The evidence the Respondent proffers is merely an expansion of the same class of information (i.e., dock work performed by the city drivers and road drivers during the period of February 1 to July 31, 2014) that the Respondent presented during the representation case proceeding. Here, the proffered evidence concerns facts that were in existence at the time of the representation hearing and it is offered in support of the same arguments by the Respondent that were fully litigated at the hearing and subsequently rejected. The Respondent has not submitted any reason why this additional evidence was unavailable during the course of the hearing or why it could not have been discovered with reasonable diligence. Further, the Respondent has failed to establish that the proffered evidence, if adduced, would change the result in the representation proceeding and has additionally failed to establish that it moved promptly to present this evidence.

(7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following a representation election held on October 31, 2014, the Union was certified on November 12, 2014, as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All full-time and regular part-time Road Drivers and City Drivers; excluding all other employees, Dockworkers, Supplemental Dockworkers, Mechanics, building maintenance employees, office clerical employees, and guards and supervisors as defined by the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

By letter dated January 20, 2015, the Union requested that the Respondent recognize it and bargain with it as the exclusive collective-bargaining representative of the unit employees. Since about January 20, 2015, the Respondent has failed and refused to do so.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since January 20, 2015, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. To ensure that employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date that the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*,

140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, FedEx Freight, Inc., Monmouth Junction, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Teamsters, Local 701 as the exclusive collective-bargaining representative of employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time Road Drivers and City Drivers; excluding all other employees, Dockworkers, Supplemental Dockworkers, Mechanics, building maintenance employees, office clerical employees, and guards and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in Monmouth Junction, New Jersey, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Re-

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDEX FREIGHT, INC.

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spendent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 20, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 19, 2015

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Teamsters, Local 701 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time Road Drivers and City Drivers; excluding all other employees, Dockworkers, Supplemental Dockworkers, Mechanics, building maintenance employees, office clerical employees, and guards and supervisors as defined by the Act.

FEDEX FREIGHT, INC.

The Board's decision can be found at www.nlr.gov/case/22-CA-146653 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

